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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-484

W. A. BOYLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner W. A. Boyle prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 16, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix A to this petiton.

The District Court's opinion and order of February 28, 1972, denying Petitioner's motion to dismiss the indictment, is reported at 338 F. Supp. 1028. The District Court's denial of Petitioner's motion for a

new trial was made orally on June 27, 1972. Both of these District Court rulings are printed as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1973. By order dated August 1, 1973 (Appendix C), the Chief Justice granted Petitioner's application for an extension of time to and including September 14, 1973, within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits imposition of criminal penalties upon a union officer solely because he authorized contributions, part of which originated in the union's treasury, to candidates for federal elective office.

2. Whether, where a union treasury contains substantial funds other than involuntary dues and assessments required of members, a conviction under 18 U.S.C. §610 for authorizing union political contributions can be sustained when the Government offered no proof, and the jury was not instructed to find, that the alleged political contributions were from the involuntary sources in the treasury.

3. Whether a union official can be convicted for conversion under 29 U.S.C. § 501(c) solely because he authorized a political contribution that was later held to be in violation of another federal statute (viz., 18 U.S.C. § 610) without regard to either (a) union authorization or ratification of the contribution, (b) benefit to the union from the contribution, or (c) the

official's bona fide belief as to union authorization, ratification and benefit.

4. Whether the Double Jeopardy clause of the Fifth Amendment or a proper application of 18 U.S.C § 371 prohibits simultaneous convictions for both conspiracy and substantive crimes where both convictions are based upon the same course of alleged criminal conduct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments and the pertinent parts of 18 U.S.C. §§ 371 and 610, and 29 U.S.C. § 501 (c), are printed as Appendix D to this petition.

STATEMENT OF THE CASE

Petitioner W. A. Boyle, at the time an officer of the United Mine Workers of America ("UMW"), was charged under a federal indictment which contained 12 substantive counts and a conspiracy count. Counts 2 through 12 charged Boyle with 11 instances of alleged authorizations of political contributions in connection with federal elections in violation of 18 U.S.C. § 610. Count 13 charged Boyle with "conversion" of union funds in violation of 29 U.S.C. § 501 (c), also in connection with a federal election contribution. The first count was the conspiracy count, charging Boyle and two other individuals (John Owens and James Kmetz) with conspiracy under 18 U.S.C. § 371 to violate the two statutory provisions involved in the 12 substantive counts.

The indictment was returned on October 4, 1971. At that time, there was pending before this Court *Pipefitters* v. *United States* in which certiorari had been granted in May 1971 (402 U.S. 994). Boyle

sought a stay of the proceedings pending a decision by this Court in *Pipefitters,* but the District Court (Richey, J.) refused the stay, and the matter proceeded to trial. The trial took place in March 1972, two months before this Court rendered its decision in *Pipefitters* reversing the decision of the Eighth Circuit (407 U.S. 385).

In addition to seeking a stay pending the *Pipefitters* decision, Boyle also moved to dismiss the indictment. Included among the 40 separately stated grounds urged in support of the motion for dismissal were the following: (1) the prosecution under § 610 would violate the First Amendment guarantees of freedom of speech, association and assembly (ground 32); (2) the indictment failed to allege that any contributions were against the wishes of the union or any union member or that any such contributions were not from a voluntary fund (grounds 14 and 15); (3) count 13 did not allege essential elements of the crime set forth in 29 U.S.C. § 501(c), specifically Boyle's lack of union authority to make the contribution or lack of union consent to it or lack of union benefit from it (ground 28); and (4) simultaneous prosecution under both the conspiracy count and the substantive counts would subject Boyle to multiplicitous prosecution and would violate his Fifth Amendment right not to be placed twice in jeopardy for the same offense (grounds 5, 17 and 22). The trial court denied the motion in all respects (338 F. Supp. 1028). At trial, Boyle moved for a judgment of acquittal both at the close of the Government's case and at the close of all evidence, explicitly reasserting all the grounds relied upon in the motion to dismiss. The trial court denied both motions for acquittal. After the *Pipefitters* decision was rendered by this

Court, Boyle moved for a new trial based upon that decision, and this motion too was denied.[1]

At trial, the Government presented evidence that the political contributions allegedly authorized by Boyle were made by Labor's Non-Partisan League (the "League"), an organization affiliated with the UMW. The Government also presented evidence to show that a substantial part, but not all, of the League's funds came from the UMW treasury. The Government failed to identify the source of approximately $60,000 in the League's treasury, which was over $10,000 more than the total amount of the contributions that were the subject of the indictment.

With respect to the UMW funds allegedly transferred to the League, the Government's evidence showed that a major part (some $90 million) of the funds in the UMW treasury came from sources *other than* involuntary dues, assessments or fees required of UMW members. These sources included anonymous contributions, sales of a book entitled "Coal and Unionism," and sales of various properties, as well as a variety of sources not identified by the Government. This $90 million in funds other than dues and assessments was some 60 times the approximately $1.5 million allegedly transferred to the League by the UMW.

The Government made no effort to show that all or any part of the money transferred from the UMW

[1] The court did not explain its reasons. It simply ruled:

> The court finds that the facts in the case of Pipefitters Local Union No. 502, et al. v. The United States, decided by the Supreme Court of the United States on June 22, 1972, are not the same or similar to those in the case at bar. [J.A. 189.]

to the League came from the dues, assessments and fees in the UMW treasury, rather than these other sources. In fact, neither the Government's opening statement,[2] nor its closing statement,[3] nor the court's instructions to the jury[4] indicated that there was any

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[2] "[I]t is basically necessary in this case for the government to establish for you that these defendants agreed to cause the United Mine Workers of America, a labor organization, to expend its funds by making political contributions to candidates for federal elective office, and we will show that, in fact, these three defendants, together with Robert Howe and Suzanne Richards, did enter into that agreement * * *; in the course of the conspiracy all five will be shown to have participated to some extent in this agreement.

"And we will show further that each one of those substantive counts I mentioned to you did [occur]" (J.A. 59).

[3] "We must establish * * * that a labor organization, and the labor organization we are talking about here is the United Mine Workers of America, made a contribution—that is, transferred money or other things of value—in connection with an election at which Senators or Congressmen or a President were elected" (J.A. 172).

[4] "The essential elements of a violation of Section 610 of Title 18, United States Code, as charged in this indictment are as follows:

"(1) a contribution, (2) by a labor organization, (3) for the purpose of active electioneering, (4) in connection with an election for named federal officers described in the statute, and (5) that an officer of a labor organization willfully consented to this contribution.

* * *

"A requisite element of any violation of Section 610 is that the contribution be made by a labor organization; that is to say, it must be shown beyond a reasonable doubt that the contribution came directly or indirectly from the funds of a labor organization.

* * *

"If you find that the Labor's Non-Partisan League purchased tickets out of funds belonging to the United Mine Workers of America to dinners or receptions and that the purpose of these dinners or receptions was to raise funds for use in connection

legal significance to the sources from which or the methods by which the UMW obtained the funds which allegedly were ultimately contributed to candidates for federal office.

The remainder of the Government's case dealt primarily with showing that Boyle had in fact authorized each of the specific contributions alleged in the eleven § 610 counts of the indictment. The 11 contributions totalled $49,250 made over a 2½ year period, and were for fund raising activities for Presidential as well as Congressional candidates. The sufficiency of the evidence in this respect was hotly disputed at trial but need not be decided by the Court in connection with the issues presented here.

One of the contributions alleged in a §610 count — a $5,000 contribution to the Democratic Congressional Committee — was also the basis for the charged violation of §501(c) for "conversion." The court, in effect, charged the jury that if the $5,000 contribution was unlawful under § 610, Boyle also was guilty of a violation of § 501(c) as a result of its transfer.

Boyle was found guilty on each of the 13 counts, including the conspiracy count even though both of the alleged co-conspirators were acquitted. He was sentenced to serve two concurrent terms of five years in prison and to pay fines and penalties totaling $179,250. A timely appeal was taken to the Court of Appeals, which affirmed the convictions.

(Continued from page 6)

with federal elections and that the cost of tickets exceeded the reasonable value of the food and drink provided, you may find that the excess of the cost over this value was a contribution within the meaning of that term as I have just defined it for you. • • • " (J.A. 177-178).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF THE CONSTITUTIONALITY OF 18 U.S.C. § 610 EXPRESSLY RESERVED BY THIS COURT IN ITS JUNE 1972 DECISION IN PIPEFITTERS v. UNITED STATES.

This case squarely presents the question specifically reserved by this Court on at least three occasions: the constitutionality of 18 U.S.C. § 610.[5]

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[5] *United States* v. *CIO*, 335 U.S. 106 (1948); *United States* v. *UAW*, 352 U.S. 567 (1957); *Pipefitters* v. *United States*, 407 U.S. 385 (1972). See also *International Ass'n. of Machinists* v. *Street*, 367 U.S. 740, 773 (1961). Other federal courts have also recognized the constitutional question posed here but have likewise gone to some lengths to dispose of the cases before them in ways which made it unnecessary to reach or resolve the constitutional issue. *E.g.*, *Ash* v. *Cort*, 350 F. Supp. 227, 232 (E.D. Pa. 1972), *aff'd*, 471 F.2d 811 (3d Cir. 1973); *United States* v. *Lewis Food Co.*, 366 F.2d 710, 714 (9th Cir. 1966); *United States* v. *Anchorage Central Labor Council*, 193 F. Supp. 504, 508 (D. Alaska 1961); *United States* v. *Warehouse Workers' Union*, 47 LRRM 2005, 2007 (E.D. Mo. 1960); *United States* v. *Construction & General Laborers Local Union*, 101 F. Supp. 869, 870, 876-877 (W.D. Mo. 1951); *United States* v. *Painters Local Union*, 172 F.2d 854, 856 (2d Cir. 1949). See also *United States* v. *The National Committee for Impeachment*, 469 F.2d 1135, 1141 (2d Cir. 1972).

Section 610 was held unconstitutional in violation of the First Amendment rights of political expression and association in a case involving bank loans to a political candidate. *United States* v. *The First Nat'l Bank of Cincinnati*, 329 F. Supp. 1251 (S.D. Ohio 1971). Although the loans technically came within the statutory language, the court held that, since the loans were fully secured and were made at ordinary bank rates, the statute was unconstitutionally restrictive. This was true even though the court recognized that "rich or influential candidates might obtain fully secured loans more easily than other candidates * * *" (*id.* at 1254).

For further indications of unconstitutionality, see Annotation, 1 L.E. 2d 1918, 1920-21 (1957).

Section 610, as construed by the Court of Appeals decision below, makes it a criminal offense for a union official to authorize any contribution by an organization which has received a substantial part of its funds from the general treasury of the union in connection with a federal election. Petitioner submits that the important constitutional issues raised by § 610 with respect to the scope of legislative power to control federal elections and the limitations on that power imposed by the First Amendment guarantees of freedom of speech and association fully justify the grant of certiorari here.

In *United States* v. *CIO, supra,* the District Court dismissed the indictment on the ground that the statute as applied was unconstitutional. This Court unanimously affirmed that judgment, but the majority did not reach the constitutional question. Four members of the Court concurred in the result but expressly based their concurrence on the unconstitutionality of the statute (335 U.S at 129).

Subsequently, in *United States* v. *UAW, supra,* this Court again postponed the constitutional question, ruling that the challenged conduct was proscribed by § 610 but that the constitutional issues should not be resolved until a full record was developed at trial. Three members of the Court, describing the statute as "a broadside assault on freedom of political expression," dissented from that disposition of the case and took the position that the Court should hold then and there that prosecution of the defendants was constitutionally barred (352 U.S. at 593).

The most recent case in which the constitutionality of § 610 was before the Court was in 1972 in

Pipefitters* v. *United States, supra. **The Eighth Circuit, in a four-to-three *en banc* decision, affirmed the convictions against a variety of challenges, including the constitutional one, and this Court granted certiorari to review that decision. However, again relying on a narrow construction of the statute, the Court found the jury instructions to be erroneous and on that basis reversed, noting:**

> **This disposition makes decision of the constitutional issues premature, and we therefore do not decide them. [407 U.S. at 400.]**

Thus, in each of the three cases in which this Court has previously dealt with § 610 prosecutions, the Court has been cognizant of the serious constitutional questions the statute raises, and the Court has in significant respects narrowly construed the statute with these questions in mind. *A total of five different members of the Court have found the statute to be unconstitutional, and no member of the Court has ever stated the contrary conclusion. We are aware of no reported decision other than the instant one in which convictions of a labor union or its officials have been sustained.* **The crucial question remaining for the future, therefore, is whether § 610, as construed and applied, is constitutional.**

As discussed in the next section of this petition, Petitioner strongly believes that the Court of Appeals decision below is contrary to this Court's decision in *Pipefitters* with respect to the essential elements required for a conviction under § 610. However, if the Court of Appeals correctly concluded that the proof and jury instructions at trial were proper under *Pipefitters* to establish a violation of § 610, the ques-

tion thus presented is whether the Court of Appeals was also correct when it held that the First Amendment permits Congress to prohibit that conduct.

Stated in its simplest form, the Court of Appeals decision flatly prohibits contributions emanating in part from the union's general treasury to advance the campaign of the candidates the union supports for election to federal office. That prohibition, enforced by criminal fines and imprisonment, is applied without regard to whether the contribution is in fact beneficial and necessary to the protection and promotion of the goals of the organized labor movement, the union or its members. It is also applied without regard to whether the union treasury contains funds other than members' dues and assessments from which the contribution can be made, whether the contribution is large or small, whether the contribution is fully disclosed to the public, or whether the union has approved or ratified the contribution.

Further, it is important to note that if a contribution violates § 610, a criminal offense is committed not only by the officer who authorizes the contribution, but also by the union itself and by the candidates or organizations who "accept or receive" the contribution.

This Court has long recognized that the First Amendment guarantees the right of political expression through association as well as through purely individual activities. *E.g., Sweezy* v. *New Hampshire,* 354 U. S. 234, 250 (1957). Thus, the Court has affirmed the rights of various types of associations to promote their goals under the protection of the First Amendment free from legislative abridgments.

NAACP v. *Button*, 371 U.S. 415 (1963); *Hague* v. *CIO*, 307 U.S. 496 (1939). Labor unions, in particular, have been recognized as legitimate associations of working men, not merely for collective bargaining activities, but also as associations for legislative purposes and political expression to protect and advance the interests of the organized labor movement and the "bread-and-butter" concerns of the members. *E.g.*, *Hague* v. *CIO*, *supra*; *Thomas* v. *Collins*, 323 U.S. 516 (1945).

There can be no question that § 610 restricts these rights of free speech and association, and the Government does not really dispute this fact. *See United States v. CIO*, *supra*, 335 U.S. at 127-128. Such a statute does not come before this Court with the usual presumption of constitutionality. *Thomas* v. *Collins*, *supra*. It is constitutional only if it is narrowly drawn to protect a legitimate "compelling interest" of the government *and* results in restrictions on First Amendment freedoms no greater than are essential to the furtherance of that interest.[6] The court below stated its holding on these issues as follows:

> Assuming, only arguendo, that § 610 does restrict in some degree a union's otherwise unlimited right of free speech, appellant has failed to advance a less restrictive alternative to § 610 which will both prevent the use of a union's aggregate wealth in federal elections and protect

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[6] *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). In *Carrington* v. *Rash*, 380 U.S. 89, 93-94 (1965), the prevention of effective, collective political power by the military concentrated in one location was held insufficient to deny military personnel the right to vote at that location.

> union minority interests, and we have found elsewhere no such viable less restrictive alternative. We hold § 610 to be constitutional. [App. A. at 14a.]

Thus, the Court of Appeals decision upholding the constitutionality of § 610 raises the questions whether the two purposes it found for § 610 are proper objectives of legislation and, if they are, whether § 610 is the least restrictive method to achieve these purposes.

Petitioner recognizes that this petition is not the place for a full argument on the merits of the case. However, Petitioner believes that one element of the opinion below is particularly instructive as to the broad implications of the decision and the critical constitutional issues it raises as well as the seriously erroneous rationale it adopts.

Petitioner argued that if § 610 is designed to regulate elections by preventing abuses arising from the potentially corruptive misuse of the large assets available from the collective funds of organizations such as labor unions, the statute was broader and more restrictive of First Amendment rights then necessary for that purpose. Petitioner specifically pointed to the possible alternative approaches represented by legislation requiring full public disclosure of campaign contributions and imposing maximum limits on the amounts of contributions.[7] The Court of Appeals, however, took an expansive view of Congress' legiti-

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[7] This Court has had no trouble in the past devising remedies to protect the rights of employees who object to the expenditure of union funds for political purposes. *See Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113, 118-124 (1963).

mate objectives and rejected these narrower legislative alternatives because, in the court's words, they would not "prevent the use of a union's aggregate wealth in federal elections" (App. A at 14a).

Perhaps the Court of Appeals had no choice but to adopt the view that Congress can legitimately seek to bar the *use* of "aggregate wealth" rather than merely its *misuse,* for the court had already conceded that the statute bars a $5 contribution as well as a $5 million contribution from the union. It is thus clear that the statute is not concerned with the *amount* of contributions; its concern is with the fact that political contributions are made by a labor union from its resources. Under the First Amendment, this is not a proper object of legislation. To the contrary, it is precisely the type of objective that the First Amendment forbids Congress from seeking to accomplish. A Congressional decree that a labor union as an entity is categorically to be viewed as an "improper" or "undue" influence in the election process solely because it has "aggregate" funds is the antithesis of the First Amendment's guarantee of freedom of political expression through association. *See United States* v. *CIO, supra,* 335 U.S. at 145-146 (Rutledge, J., concurring).

Section 610 as construed by the Court of Appeals is, in effect, such a decree. Petitioner submits that Congress' powers do not extend so far. Whatever the ultimate decision of this Court may be, however, the issue is one of such importance as to justify this Court's consideration and decision. If Congress may properly seek to bar the use of associations' aggregate resources in federal elections, that power is obviously

of direct concern to unions and their members as well as to all other types of associations, including every company in the United States. Congress' power to regulate our political processes through controls over election financing is, indeed, of profound and immediate concern to all citizens.

The question as to Congress' power to restrict the political expression of a union under the guise of protecting minority members in the union also presents serious constitutional problems, both with respect to the legitimacy of that objective and the application of that objective by § 610. The threshold question presented in this regard is whether the statute is overly broad in prohibiting contributions where the record shows substantial funds in the union treasury from other than involuntary sources, and the Government makes no effort to show that the contributions in fact came from the dues and assessments. In addition, if this Court were to adopt the view that any contribution from the general treasury is properly presumed to include monies from the involuntary sources in the treasury, then the Court would need to reach the further question whether § 610 as applied to prohibit contributions from such involuntary sources is constitutional. In effect, the statute under these circumstances insists upon "atomized individual rule and action in matters of political advocacy." *United States* v. *CIO, supra,* 335 U.S. at 147. Such a radical departure from the normal principle of majority rule in collective associations with its attendant restraint on political association and expression further justifies the review by this Court of the decision below.

II.

THE DECISION BELOW INVOLVES IMPORTANT QUESTIONS OF THE CONSTRUCTION OF TWO FEDERAL STATUTES REGULATING CAMPAIGN CONTRIBUTIONS AND UNION OFFICERS' ACTIVITIES.

A. The Court of Appeals' Construction of 18 U.S.C. § 610 Is Contrary To This Court's Decision in Pipefitters.

This Court in *Pipefitters* held that union political contributions violated § 610 "if, *and only if,* payments to the fund were actually or effectively required for employment or union membership" (407 U.S. at 439; emphasis added). Because the jury instructions failed to require either proof or a finding as to this "essential element for conviction" (*id.* at 436), the convictions were reversed. The Court thus explained:

> * * * [T]he essence of the crime in this respect is whether the method of solicitation for the fund was calculated to result in knowing free-choice donations. Whether the fund was otherwise controlled by the Union is immaterial. [*Id.* at 439.]

The Court of Appeals in this case, however, held that the requirement of proof of the involuntariness of the source of contributions was not a necessary element of the Government's case against Petitioner under § 610 and did not even have to be submitted to the jury. Rather, the court affirmed Petitioner's conviction on the basis of its conclusion that the violation consists of only the following elements:

> The Government must prove beyond a reasonable doubt that (1) a labor organization (2) made a contribution or expenditure (3) in connection with a specified federal election (4) for purposes of active electioneering and that (5) the defendant officer consented to the making of the contribution. [App. A at 6a.]

This statement of the necessary elements under § 610 is almost identical to the charge given the jury.[8]

In explaining this statement, the Court of Appeals expressly rejected Petitioner's contention that proof of involuntary sources was an additional essential element of a violation.[9] The court justified its apparent departure from *Pipefitters* by taking the position that *Pipefitters* requires a showing of the involuntariness of the sources of political contributions only in cases involving a "separate fund". Where the contributions were from the union treasury, the court ruled, nothing further need be shown as to the involuntariness of the

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[8] The relevant portions of the charge are set forth in the Statement of the Case, *supra*, n.4. It is clear that under this charge the jury could have convicted solely because it thought Petitioner "consented" to a contribution by a "labor organization" for the purpose of active electioneering in connection with a federal election, even though this Court plainly held in *Pipefitters:*

> Nowhere * * * has Congress required that the political organization [which makes the political contribution] be formally or functionally independent of union control or that union officials be barred from soliciting contributions or even precluded from determining how the monies raised will be spent. [407 U.S. at 415.]

Moreover, the Court in *Pipefitters* stated that hereafter a proper jury charge under § 610 could "be framed in terms of the application to the proof of the language of § 205 of the Federal Election Campaign Act" (407 U.S. at 441 n.51), which the Court said "plainly permits union officials to establish, administer, and solicit contributions for a political fund" (*id.* at 421).

[9] The Court of Appeals misconceived Petitioner's position when it said Petitioner wanted the Government to "show in all circumstances that the contributions *could not* have come from a 'voluntary' source" (App. A. at 9a). Petitioner's position is rather that the Government carries the burden of showing that the illegal contributions in fact came from an involuntary source. That is how the statute was interpreted in *Pipefittters.*

contribution (Opinion at 9-10). To support this conclusion, the court stated:

> Congress in prohibiting expenditures from a union general treasury simply acted on the principle that expenditures from commingled funds *will be presumed* to consist of proportionate shares of the different types of money. [App. A at 9a n.16; emphasis added.]

In thus speaking in terms of what "will be presumed" under § 610, the court, of course, is really stating that under the statute it makes no difference to what extent sources other than dues are contained in the treasury or whether, in fact, non-dues monies are actually used to make the contributions. *As a matter of law,* any contribution originating from the union treasury is automatically deemed to include members' involuntary dues and assessments and, therefore, is prohibited. That approach is directly contrary to the one taken by other lower courts in interpreting § 610.[10]

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[10] For example, in *United States* v. *Seafarers Intern'l Union,* 343 F. Supp. 779 (E.D. N.Y. 1972), the indictment was dismissed as to all union defendants in part because the Government had not fully complied with court orders to supply the defendants in advance of trial with precisely which part of a political fund the Government thought was made up of involuntary dues and assessments and which part was from other sources. The court noted, significantly: "Especially *since the Government's case must succeed or fail with its ability to show the involuntariness of contributions to SPAD* [the political fund] and considering the minimum lapse of four years between the time of contribution to SPAD and the time of trial, the defendants' need for specification of circumstances is almost self-evident" (*id.* at 783 n.6; emphasis added). It is difficult to understand why the Government must show the involuntary portion of a fund in advance of trial if, as the Court of Appeals ruled here, mingled voluntary and involuntary sources relieve the Government of any burden to prove an involuntary portion at the trial itself.

In *United States* v. *Anchorage Central Labor Council, supra* n.5, the court granted a motion for acquittal in part because "some,

Moreover, the Court of Appeals' refusal to circumscribe the reach of § 610 by making the question of involuntariness an indispensable element of the crime is precisely the refusal that this Court struck down in *Pipefitters*. Both the trial court and the Court of Appeals in *Pipefitters* felt that the ultimate question under § 610 was whether the money contributed was "union money." Thus, the trial court's instructions called for a guilty verdict if the fund from which contributions were made "was in fact a union fund, * * * the money therein was union money, and * * * the real contributor to the candidates was the union" (quoted at 407 U.S. at 441).[11] The Eighth Circuit's affirmance was similarly based upon its acceptance of the Government's claim that the ultimate question is whether

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at least, of the unions had sources of income other than dues, as for example *rental of property* owned by the union or *interest on savings accounts or bonds*" and "these funds were commingled into one general fund, such that it would be impossible to say whether the TV contributions and the per capita tax were paid out of dues or other income" (193 F. Supp. at 507; emphasis added). In other words, the fact that there were commingled voluntary and involuntary funds justified an order of acquittal in that case, whereas the Court of Appeals here is saying that the question of source should not even have been submitted to the jury.

Again, in *United States* v. *Warehouse Workers' Union*, *supra* n.5, the court entered a judgment of acquittal as to all union defendants in a § 610 case, ruling in part:

> * * * there has been no evidence adduced by the Government that the allocations by roughly two-thirds of the individual members of Local 688—a defendant here—were not entirely voluntary—*even though they may have been allocations from the general dues* paid by such individuals as Union members. [47 LRRM at 2006, 2007; emphasis added.]

[11] The Government had plainly stated in opposition to a motion to dismiss: "The issue is whether these funds were the general funds of Local 562" (quoted at 407 U.S. at 437).

"the money in the fund is in truth and in fact money belonging to Local 562" and that the issue of voluntariness while "relevant is not controlling" (434 F.2d at 1120). The opinion of the Court of Appeals in the instant case, adopting the view that "the proper issue" is whether the "source of the funds transferred * * * was the UMW treasury" (App. A at 11a), reflects the same misconstruction of the reach of § 610.

It is crucial to note that this is *not* a question of the sufficiency of the evidence presented by the Government to support a jury's finding of involuntariness. Rather, the question is the fundamental one of what are the essential elements of the crime as to which the jury must be instructed. The Government's evidence showed that some (but not by any means all [12]) of the funds in the League's treasury came from the general treasury of the UMW. But the evidence also showed that a large part of the UMW's general treasury (in excess of $90 million) consisted of monies other than the dues and assessments required to be paid by union members. The jury was not instructed that it had to find that the involuntary sources were used for the contributions in order to render a verdict of guilty. Indeed, the words "voluntary," "involuntary," "compulsory," or "required" nowhere appear in the jury instructions. The Court of Appeals simply took away from the jury its most important function: fact-finding. The court itself repeatedly made the factual determinations which should have been left to the

[12] The "relatively small portion" of the League's funds which the Court of Appeals admitted the Government could not account for (App. A at 4a n.5) was actually substantially in excess of the total amount which allegedly was illegally contributed (see Statement of the Case, *supra* at 5-7).

jury.[13] The question, thus, is whether under *Pipefitters* a conviction can be sustained only where the Government has proved and the jury has been properly instructed to find that the source of campaign contributions was members' compulsory dues or assessments "actually or effectively required for employment or union membership."

The trial below took place before the *Pipefitters* decision was rendered and it is, therefore, understandable that the Government proceeded upon the same view of § 610 it had successfully espoused before the trial court and the Eighth Circuit in *Pipefitters*. How-

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[13] *E.g.*, "In Boyle's case, though, contributions were made from funds derived from the general UMW treasury, which was composed predominantly of dues, assessments and other 'involuntary' funds" (App. A at 8a); "A substantial, or huge, portion of the money in the League treasury was 'involuntary' at the time of the contribution. The 'involuntary' portion may be presumed to be a part of each expenditure from the commingled funds" (*id.* at 9a n.16); "the undisputed evidence establishes the involuntary nature of the members' contributions to the UMW general treasury • • • (*id.* at 11a).

This approach should be compared with that in *United States* v. *Lewis Food Co.*, 236 F. Supp. 849 (S.D. Cal. 1964), *remanded*, 381 U.S. 908 (1965), *rev'd*, 366 F.2d 710 (9th Cir. 1966). The District Court dismissed a complaint charging a violation of § 610 in part because the complaint failed to charge that the expended funds came from the general corporate treasury. In the Court of Appeals, the Government conceded that "a crucial consideration is whether the corporation's general funds were employed in financing the advertisement" (366 F.2d at 713), as opposed to "some independent fund contributed by shareholders or otherwise obtained" (*ibid.*). However, the Government argued—and the Court of Appeals agreed—that the source of the funds was "a question of fact to be resolved by a jury". The complaint did not have to allege the source because "[e]ntry of the plea of not guilty" in and of itself "gave rise to a question of fact as to the source of the corporate funds" (*ibid.*).

ever, the trial court's refusal to grant a new trial after the decision in *Pipefitters*, and the Court of Appeals' decision upholding that conviction, have resulted in a construction of § 610 so fundamentally at odds with the principles established in *Pipefitters* that it will, if permitted to stand, seriously erode the effect of *Pipefitters* and re-create the uncertainty as to the reach of § 610 that *Pipefitters* sought to eliminate.

In sum, Petitioner submits that review of this case is necessary to clarify the reach of § 610 as a limitation on the permissible political activities of labor unions and to prevent serious departure by the Court of Appeals from the principles enunciated by this Court in *Pipefitters*.

B. The Court of Appeals' Construction of 29 U.S.C. § 501(c) Is Improper and in Conflict With That of the Second Circuit.

Count 13 of the indictment charged that Petitioner "did unlawfully and willfully convert to the use of others" $5,000 that was contributed to the Democratic Congressional Committee. This same contribution was charged in an earlier count in the indictment as being one of the contributions made in violation of § 610. The Government claimed, and the court instructed the jury, that if the contribution was "unlawful" in the sense of being in violation of § 610, Petitioner's authorization of the transfer was a "conversion" illegal under 29 U.S.C. § 501(c).

Most importantly, the trial court instructed the jury that if the contribution was improper under § 610, Petitioner violated § 501(c) even if the evidence showed and the jury found that (1) the contribution was approved and ratified by UMW's Executive Board and (2) the contribution was made for the benefit of the

UMW.[14] The Court of Appeals held this instruction to be proper and, therefore, affirmed the conviction for conversion under § 501(c).

In reaching this conclusion, the Court of Appeals seriously misconstrued the statute, in disregard of its legislative history and in conflict with the principles applied by the Second Circuit in one of the leading cases under § 501(c), *United States* v. *Silverman,* 430 F.2d 106 (2d Cir. 1970), *cert. denied,* 402 U.S. 953 (1971).

In *Silverman,* the Second Circuit reversed the conviction of a union officer who allegedly authorized payments of certain printing expenses on behalf of one of the candidates in a New York City mayoralty campaign. Judge Friendly's opinion for the court reviewed the legislative history of the language used in § 501(c) and concluded:

> When Congress in 1959 subjected to criminal sanctions "any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another" any of the assets of a labor organization of which he is an officer or employee, it was not inventing new language. The phraseology resembles that used in

[14] The court instructed the jury on this point as follows:

> During the course of trial there has been mention of the fact that the transfer of the $5,000 to the Labor's Non-Partisan League, and then allegedly to the Democratic Congressional Committee, was ratified by the International Executive Board of the United Mine Workers of America and was made for a legitimate union purpose.
>
> I now instruct you that the defenses of ratification and union purpose are not relevant if you find that the transfer of funds was for a purpose illegal under the laws of the United States, specifically, Section 610. [J.A. 184.]

> defining many "larceny-type" offenses in the criminal code. * * * [D]espite minor variations in language the common thread [in these larceny-type offenses] is that *the defendant at some stage of the game, has taken another person's property or caused it to be taken, knowing that the other person would not have wanted it to be done.* [430 F.2d at 126-127; emphasis added.]

This conclusion is fully supported in the legislative history, where the sponsors of the statute made clear that § 501(c)

> does not limit in any way the purposes for which the funds of a labor organization may be expended * * *. Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and by-laws, or by a resolution of the executive board, convention or other appropriate governing body * * *. [105 Cong. Rec. 17900 (1959).]

On this basis, the Second Circuit concluded that, at a minimum, the Government must show "*either* a lack of bona fide authorization *or* an absence of benefit to the labor organization from the expenditure," in order to establish a violation of § 501(c) (430 F.2d at 127; emphasis added).

The courts in this case, in contrast, found neither of these elements to be required for conviction. Rather, under their view, a violation of § 501(c) is established even if the officer is acting in accordance with the authorization of his union and for its benefit. The Court of Appeals sought to distinguish *Silverman* on the ground that the contributions to a local candidate there were lawful, while the contribution to federal candidates in this case violated § 610. This difference, however, simply fails to meet the fundamental thrust

of § 501(c) as recognized by the Second Circuit. The statute is designed to insure that union officials fulfill their fiduciary duties to the union and do not use union funds for purposes other than union purposes or without the union's agreement. The fact that an expenditure—a political contribution approved by the union and unquestionably for its benefit—is later found to violate a complex federal statute regulating campaign contributions does not turn it into a criminal conversion of the funds.

This construction of the statute has serious ramifications for all union officers. If the term "conversion" is stretched to include any expenditure that is later found not to have been entirely in accord with every local, state or federal law, the officers approving that expenditure will find themselves subject to the drastic criminal penalties of § 501(c).

If the Court of Appeals decision is permitted to stand, it will mean that union officers must hereafter act at their peril. Clearly wrongful acts of unauthorized use of union funds for personal benefit will be punished, but so will entirely good faith acts pursuant to the authorization of the union for purposes beneficial to the union. This ever-hanging threat is intolerable and will block the effective performance of union officials' duties, which clearly was not intended by Congress.

III.

THE CONSPIRACY CONVICTION RAISES CONSTITUTIONAL QUESTIONS AS TO DOUBLE JEOPARDY AND THE APPLICATION OF THE FEDERAL CONSPIRACY STATUTE.

In addition to the 12 substantive counts, the indictment charged Petitioner in the first count with conspiracy under 18 U.S.C. § 371 to commit the substantive violations. At trial, the Government's evidence

showed that 48 of the 52 overt acts alleged in support of the conspiracy count were integral parts of the substantive offenses charged in counts 2-13. The remaining 4 overt acts were merely the sending of memoranda which were unquestionably insufficient to establish an unlawful conspiracy. Both of the two indicted co-conspirators were acquitted.

In *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946), this Court stated that a conspiracy charge may not be added to substantive charges where the substantive crime requires a concert of action and there is no element present in the conspiracy that is not also present in the substantive offense. Subsequent cases have recognized that if the same evidence is required for both the substantive and conspiracy counts, prosecution under both is not permitted. *E.g., Pereira* v. *United States,* 347 U.S. 1, 11 (1954).

Under these cases, Petitioner submits that his conviction for conspiracy under count 1 was improper and in violation of the Fifth Amendment protection against double jeopardy. The "crime" of authorizing a campaign contribution necessarily involves other persons in the union organization required to make expenditures, and the so-called "conspiracy" was in reality nothing more than the process of authorizing union expenditures.

Further, even if the conviction does not technically violate the Double Jeopardy clause, Petitioner urges this Court to re-examine the application of the federal conspiracy statute in this context. From the time of Mr. Justice Jackson's extensive criticism of the use of conspiracy charges in his concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 445 (1949), there has been an increasing recognition of the unfair-

ness and abuses resulting from the misuse of § 371. Commentators have increasingly expressed concern about the dangers of unfairness to conspiracy defendants,[15] and judges, too, have expressed the same view. *E.g., United States* v. *Vaught,* 434 F.2d 124, 125 (9th Cir. 1970) (Ely, J., concurring), *cert. denied,* 401 U.S. 976 (1971).

In particular, experience has vividly demonstrated the abuses in the present practice of permitting prejudicial and irrelevant evidence to be used against defendants under the guise of a "conspiracy count" (*see, e.g., Krulewitch* v. *United States, supra,* 336 U.S. at 453), and the present case is an excellent example.

The Government's case at trial established that its own principal witness, Robert Howe, concluded that the League's method of making political contributions was illegal. Howe wrote several memoranda to Petitioner expressing his views. Petitioner promptly took Howe's contentions to the UMW General Counsel, Edward L. Carey, who advised him that Howe was wrong. Fearful that he was indeed correct and that Petitioner and Carey were the ones who were in error, Howe devised an elaborate scheme for making the League's political contributions from Howe's own personal checking account—with either prior or subsequent reimbursement by the League. The evidence also indicated that the defendant Kmetz participated

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[15] E.g., Kircheimer, *The Act, The Offense And Double Jeopardy,* 58 Yale L.J. 513, 518-519 (1949); Goldstein, *The Krulewitch Warning: Guilty by Association,* 54 Geo.L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling,* 24 Brooklyn L.Rev. 1 (1957); Note, 16 Hastings L.J. 465 (1965); Nathanson, *Freedom of Association and The Quest for Internal Security: Conspiracy from Dennis to Dr. Spock,* 65 Nw.U.L.Rev. 153 (1970).

to a limited extent in at least one such transaction by similarly using his personal checking account. There was no persuasive evidence to support the conclusion that these actions by Howe and Kmetz were anything more than unilateral attempts on their part to minimize detection of what they considered illegal conduct. And yet by means of the "conspiracy" count, the evidence of Howe's and Kmetz's suspicious conduct was admitted into evidence against Petitioner, who was convicted and severely sentenced while Howe was not indicted and Kmetz was acquitted.

The Court of Appeals below felt it lacked authority to undertake revisions of existing rules to curb such abuses. This refusal underscores the necessity for this Court to act.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should grant a writ of certiorari and reverse the judgment of the Court of Appeals for the District of Columbia Circuit.

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